IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3326 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes. : YES

2. To be referred to the Reporter or not? Yes. :

3. Whether Their Lordships wish to see the fair copy of the judgement? No. : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No. : NO

5. Whether it is to be circulated to the Civil Judge? : NO
No.

THAKORE NANDABEN JASUJI

Versus

THAKORE LAKSHMIBEN ATAJI & ANOTHER

Appearance:

MR AR AMIN for MR HR PRAJAPATI for Petitioner

MR PK JANI for Respondent No. 1

MR MA BUKHARI for Respondent No. 2

CORAM : MR.JUSTICE C.K.THAKKAR

Date of decision: 27/03/2000

ORAL JUDGEMENT

This petition is filed by the petitioner for an appropriate writ, order or direction quashing and setting aside the order dt. February 17, 1999 passed by the Civil Judge (Senior Division), Mehsana in Election Petition

No.3 of 1997.

2. The case of the petitioner is that she is a permanent resident of village Chaluva, Taluka and District Mehsana. Election for the office of Sarpanch of Chaluva Gram Panchayat was held on February 10, 1997. The election was held in accordance with the provisions of the Gujarat Panchayats Elections Act, 1993 (hereinafter referred to as "the Act") and the Gujarat Panchayats Elections Rules, 1997 (hereinafter referred to as the " the Rules"). According to the petitioner, at the time of first counting, the petitioner obtained 773 votes, whereas the respondent no.1 obtained 779 votes. Thus, the respondent no.1 obtained more votes than the petitioner and accordingly, she was declared as elected candidate for the office of Sarpanch under Rule 60 of the Rules. Since the difference of votes obtained by the petitioner and respondent no.1 was small, the petitioner applied for re-counting under Rule 61 of the Rules. Recounting was granted and at recounting, the petitioner obtained 783 votes as against first respondent who had obtained 781 votes. The petitioner was, hence, declared as elected. It was the allegation of the petitioner that after the petitioner was declared as elected, signatures from both the candidates viz. petitioner as well as first respondent were obtained by the Returning Officer and she left the place of counting. After the petitioner left the place, the Returning Officer/Election Commissioner and Taluka Development Officer in collusion and connivance with the respondent no.1 granted further recounting and in that further recounting, as asserted by the first respondent, the petitioner obltained 772 votes as against first respondent who had obtained 776 votes. Thus, the respondent no.1 was declared as an elected Sarpanch.

3. Since the petitioner was convinced that the action taken by the second respondent was illegal and contrary to law, was malafide and contrary to the provisions of the Act and the Rules, she challenged it by filing Election Petition No.3 of 1997 in the Court of learned Civil Judge (Senior Division), Mahesana ("Election Tribunal" for short) under Sec.31 of the Act. The Election Tribunal, by the impugned judgment and order dt. February 17, 1999, dismissed the petition, inter alia, observing that there was no illegality and/or illegality committed by respondent no.2 in granting re-recounting and that when the first respondent obtained more votes than the petitioner in the said counting, the petitioner could not make a grievance against declaration to that effect and in declaring her as an elected

candidate to the office of Sarpanch of Chaluva. The learned Judge also observed that third time counting was permitted under the Election Rules.

4. The above order passed by the Election Tribunal is challenged in the present petition. Initially, notice was issued and thereafter it was admitted by issuing Rule. I have heard Mr. Amin for Mr. Prajapati for petitioner, Mr. P.K.Jani for respondent no.1 and Mr. Bukhari, learned Assistant Government Pleader for respondent no.2.

5. Mr. Amin strenuously contended that procedure adopted by Election Commissioner -respondent no.2 was illegal and contrary to law. Under the relevant Rules, only recounting is permissible and re-recounting is unknown to law and it could not have been granted by respondent no.2. The respondent no.2 thus exceeded his powers under the Rules and the order is illegal and unlawful.

6. The Election Tribunal has committed an error of law in dismissing the election petition filed by the petitioner and in observing that no illegality was committed by the Election Commissioner -respondent no.1, and by further observing that under the Rules, third counting was permissible. As re-recounting is not permissible, the order passed by Election Tribunal is liable to be set aside.

7. Learned counsel submitted that matter pertains to election. Rights and liabilities in such matters are governed strictly by relevant provisions of law and it was incumbent on the respondent no.1 and Election Tribunal to decide the questions raised before them within the four corners of law. By not doing so, they have exceeded their powers and jurisdiction and the orders are, therefore, vulnerable.

8. Mr. Jani, learned counsel for the respondent no.2, on the other hand, supported the action taken by the respondent no.2 and the order passed by the Election Tribunal. He submitted that at the first counting, respondent no.1 succeeded and in recounting, petitioner was found to have obtained more votes than the respondent no.1 further recounting was granted. Even if it is assumed that there was some irregularity, the Election Tribunal rightly did not interfere with the order passed by respondent no.2 and this court in exercise of powers under Article 226/227 of the constitution, may not interfere with such orders.

9. Learned counsel further contended that looking to the prayer made by the petitioner in the present petition also, there is no prayer to declare the petitioner as returned candidate and hence no such prayer can be granted by this court. This is, therefore, not a fit case to distrub the orders by the respondent no.2 as well as Election Tribunal inasmuch as even if this court is satisfied on the contention raised by the petitioner, in absence of the relevant prayer by her, she cannot be declared as returned candidate and the respondent no.1 who is a returned candidate would be deprived of the Office.

10. Mr. Jani also drew my attention to the provisions of Section 31 of the Act, particularly sub-section (2) thereof which prohibits the Judge exercising powers under Section 31 from setting aside the election on the ground of "any error" by the Officer charged with carrying out the Rules unless the result of the election has been materially affected. He submitted that though the Election tribunal has not specifically referred to the said provision, in dismissing the petition, the said provision was very much in the mind of the Tribunal, which is clear from the observation that "performance and compliance of election rules itself cannot be a ground for setting aside legally declared election result ". He also submitted that no such ground that re-recounting was not permissible was taken before the Election Tribunal and such a ground cannot be permitted to be raised for the first time in this court. At the most, the matter requires to be remanded to the Election Tribunal.

11. Mr. Jani contended that if re-recounting was not in accordance with law, even re-counting was not ordered in accordance with Rule 61 and it was required to be ignored.

12. In the facts and circumstances of the case, in my opinion, the petition deserves to be allowed partly. From the record, it clearly appears that at the time of counting i.e. first counting, whereas petitioner obtained 773 votes, first respondent obtained 779 votes. Thus, respondent no.1 obtained more votes and she was declared as successful candidate. In recounting, the petitioner obtained more votes (783), as against that respondent no.1 (781). Though it was the case of the petitioner that thereafter she left the place of counting and the second respondent in collusion and connivance with the first respondent gave permission of re-recounting, wherein the petitioner obtained 772 votes

and the respondent no.1 obtained 776 votes, no such contention appears to have been taken even before the Election Tribunal.

13. Rule 60 of the Rules provides for counting of votes. Sub-rule (7) thereof states that after completion of counting, the Returning Officer shall record in the result-sheet in Form 27 the total number of votes polled by each candidate and announce the same. It appears that it was undertaken by respondent no.2 and result was declared. Rule 61 enables the authority to recount votes and enacts that after an announcement of total number of votes polled by a candidate has been made under sub-rule (1) of Rule 60, a candidate, or, in his absence, his election agent or any of his counting agent may apply in writing to the returning officer for recounting the votes either wholly or in part stating the grounds on which he demands such recounting. On such application being made, the returning officer shall give his decision and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable. Every decision of the returning officer under sub-rule (2) shall be in writing and must contain reasons in support of such order. It also lays down the procedure, when returning officer decides to allow recounting of the votes, in that case, he would allow recounting, amend result-sheet in Form 27 to the extent necessary after such recounting and announce the amendment so made by him.

14. Sub-rule (5) of Rule 61 is relevant for the purpose of deciding the controversy between the parties which reads as under:-

Sub-rule (5)

After the total number of votes polled by each candidate has been announced under sub-rule (7) of rule 60 or sub-rule (4), the returning officer shall complete and sign the result sheet in Form 27 and no application for a recount shall be entertained thereafter;;

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub-rule (1).

From the above rule, it is clear that after counting or recounting, as the case may be, the returning officer will complete, sign result sheet in Form 27 and no

application for recount shall be entertained thereafter. In other words, under relevant rules, first, counting will be made. In case, an application is made to the Returning Officer in writing by or on behalf of a candidate for recounting, such recounting may be permitted by the Returning Officer by an order in writing supported by reasons, and thereafter recounting will be made and no application for further recounting shall be entertained by him.

15. There is, therefore, substance in the contention of Mr. Amin that further recounting ought not to have been granted by the Returning Officer. Mr. Jani, no doubt, submitted that if the contention of the learned counsel for the petitioner was that further recounting was not in accordance with law and such recouning was an illegality or irregularity, even recounting was also not in accordance with law inasmuch as there is nothing on record to show whether any application for such recounting was made by or on behalf of the defeated candidate (petitioner herein) and the application was granted by the returning officer by passing an order recording reasons in support of such order. Mr. Jani urged that if the provisions of sub-rule (5) of Rule 61 were not complied with, there is nothing to show regarding observance of sub-rules (1), (2) and (3) of Rule 61 of the Rules. Even that action was illegal and unlawful. He further submitted that since the Election Tribunal did not decide the matter against first respondent, it was not necessary for her to raise such contention before Election Tribunal. This court may, therefore, remand the case to the Election Tribunal to decide the same afresh after considering the record of the case.

16. In my opinion, the contention is well-founded and must be upheld. As necessary material is not on record, the only course left open is to set aside the order passed by the Election Tribunal by directing the Tribunal to decide the matter afresh on the basis of the materials available on record.

17. For the foregoing reasons, the petition deserves to be allowed and is accordingly allowed. The order passed by the learned Civil Judge (Senior Division), Mehasana on February 17, 1999 in Election Petition No.3 of 1997 is quashed and set aside and the matter is remanded with a direction to decide the same in accordance with law. Rule is made absolute to the above extent. In the facts and circumstances of the case, there shall be no order as to costs.

Date:27/3/2000. (C.K.THAKKER,J.)

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